Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of Time Warner Cable for	)	WC Docket No. 06-55
Declaratory Ruling That Competitive	)	
Local Exchange Carriers May Obtain	)	
Interconnection Under Section 251 of	)	
the Communications Act of 1934, as	)	
Amended, to Provide Wholesale	)	
Telecommunications Services to VoIP	)	
Providers	)	

COMMENTS OF THE IOWA RLEC GROUP

Robert F. Holz, Jr.
DAVIS, BROWN, KOEHN, SHORS & ROBERTS, P.C.
The Financial Center
666 Walnut Street, Suite 2500
Des Moines, IA 50309-3993

Counsel for the Iowa RLEC Group

April 10, 2006

#1259182

By its Public Notice of March 6, 2006, modified on March 21, 2006, the Commission established an opportunity for comments on the Petition for Declaratory Ruling filed in the above-captioned docket on March 1, 2006 by Time Warner Cable. The Iowa RLEC Group submitting these comments consists of all those rural local exchange carriers who were identified as the RLEC Group as parties in the Sprint arbitration proceedings before the Iowa Utilities Board (Iowa Board) in Docket Nos. ARB-05-2, ARB-05-5 and ARB-05-6. The companies participating in that consolidated proceeding are identified by the Iowa Board in its Arbitration Order issued March 24, 2006. A copy of that list is attached as **Attachment A.**

As stated at page 8 of Time Warner's Petition, the Iowa Board has addressed the threshold issue of Sprint's status as a telecommunications carrier under federal law in the above identified arbitration proceedings. The Iowa Board made an initial determination that Sprint was not a telecommunications carrier. It reversed this decision in a subsequent Order on Rehearing. These two orders of the Iowa Board are included in the Time Warner Petition at Tabs 4 and 10. It is the position of the Iowa RLECs that the Iowa Board ruled appropriately in its initial Order Granting Motion to Dismiss and is erroneous in its Order on Rehearing which finds that Sprint proposes to operate as a common carrier and thus would be a telecommunications carrier under federal law. This issue is currently pending before federal district courts in Illinois, Nebraska and New York and will soon be ripe for appeal to the federal district court in Iowa.

While not germane to the determination of whether Sprint operates as a common carrier, it should be noted that, in Iowa, Sprint's status is different than as contemplated within the Petition. The very heading of the Petition is "that competitive local exchange

carriers may obtain interconnection". At page 12 of the Petition, it is alleged that it has been previously determined that incumbent LECs must interconnect "with competitive carriers such as Sprint and MCI". In Iowa, Sprint is not a competitive local exchange carrier (CLEC). It has never been a CLEC in any of the areas served by the Iowa RLECs and has withdrawn as a CLEC in the Qwest exchanges where it had been previously authorized to serve.

Time Warner at page 13 of its Petition alleges that state commissions had interpreted Section 251 of the Act to authorize interconnection only for telecommunications carriers seeking to provide retail services to end users. As the orders of the Iowa Board clearly indicate, that allegation is clearly not applicable in Iowa. The Board's Order Granting Motions to Dismiss of May 26, 2005 stated expressly at pages 11-12 "These bodies have interpreted the definition to require that a 'telecommunications carrier' can be either a retail or wholesale provider, but it must be a common carrier." The entire analysis of the Iowa Board related to the question of whether Sprint would serve as a common carrier. That is the fundamental issue which is presented to the Commission in this proceeding.

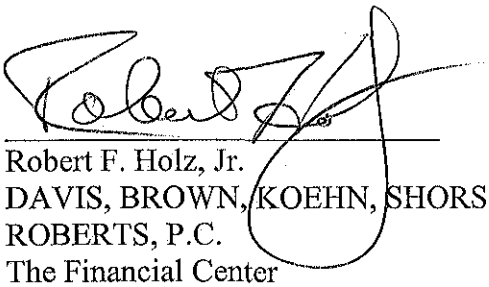
The RLEC Group presented briefs to the Iowa Board addressing the question of Sprint's status as a common carrier. Its brief of April 29, 2004 addressing the Motion to Dismiss before the Board is attached as **Attachment B**. Its brief of October 28, 2005 addressing the Rehearing Request is attached as **Attachment C**. These briefs have been redacted to remove portions unrelated to the common carrier issue. They reflect the positions of the RLEC Group on the fundamental issue before the Commission.

The key distinction in the determination of offering service as a common carrier is not in "what" is offered or to "whom" it is offered, but rather "how" the services are offered and delivered. Sprint has argued that because it offers a common menu of services for buyers to purchase and it will offer those services to any last mile retail service provider, it is thus a common carrier. Acceptance of that Sprint premise was the error of the Iowa Board in its Order on Rehearing. While the "who" is important to an initial determination as to whether or not any services at all will be offered "to the public", it is not determinative as to whether those services will be offered on a common carrier basis. "What" services may be offered is also not determinative because it is known that the same services can be offered either on a common or private carrier basis. What makes the carrier service "common" is that the customer can simply elect to chose the service based on generally available public displayed rates, terms and conditions of service. The service proposed by Sprint is the antithesis of what is "common". Rather, its services are offered only on an individually contracted highly confidential basis. This was precisely the Nebraska Commission's determination when it found "Sprint's arrangement with Time Warner is an individually negotiated and tailored, private business arrangement shielded from public review and scrutiny." *Nebraska PFC Arbitration Order*, p. 9 (Petition, Tab 7). The service of Sprint in this context is clearly not offered on a common carrier basis.

The Petition concludes at page 18 "Only a declaratory ruling by this Commission can insure the national oversight and uniformity needed to eliminate the continuing impediments to local telephone competition." The Iowa RLEC Group does not oppose a determination by the FCC concerning the status of Sprint as a common carrier. However,

its conclusion is opposite of that proposed by Time Warner. The Commission should declare that Sprint is serving not as a common carrier and thus a telecommunications carrier, but rather as a vendor to the applicable cable company. It is the cable company service provider which should be negotiating interconnection agreements for the provision of their CLEC services. Sprint simply does not meet the tests for common carrier status and thus determination as being a telecommunications carrier under the standards of NARUC 1, SWBT, Virgin Islands or the Wireline Broadband Order discussed in the briefs attached hereto. Thus, the Commission should declare that Sprint is not a common carrier and thus, not a telecommunications carrier as defined under the Act.

Respectfully submitted,



Robert F. Holz, Jr.
DAVIS, BROWN, KOEHN, SHORS & ROBERTS, P.C.
The Financial Center
666 Walnut Street, Suite 2500
Des Moines, IA 50309-3993
Telephone: 515-288-2500

Counsel for the Iowa RLEC Group

Fields of Opportunities

STATE OF IOWA

THOMAS J. VILSACK
GOVERNOR
SALLY J. PEDERSON
LT. GOVERNOR

IOWA UTILITIES BOARD
IOWA DEPARTMENT OF COMMERCE

SPRINT COMMUNICATIONS COMPANY L.P., PETITIONING PARTY, vs. ACE COMMUNICATIONS GROUP, CLEAR LAKE INDEPENDENT TELEPHONE COMPANY, FARMERS MUTUAL COOPERATIVE TELEPHONE CO. OF SHELBY, FARMERS TELEPHONE COMPANY, FARMERS MUTUAL TELEPHONE COMPANY, GRAND RIVER MUTUAL TELEPHONE CORPORATION, HEART OF IOWA COMMUNICATIONS COOPERATIVE, HEARTLAND TELECOMMUNICATIONS COMPANY OF IOWA d/b/a HICKORYTECH, HUXLEY COMMUNICATIONS, IOWA TELECOMMUNICATIONS SERVICES, INC., d/b/a IOWA TELECOM f/k/a GTE MIDWEST, KALONA COOPERATIVE TELEPHONE, LA PORTE CITY TELEPHONE COMPANY, LOST NATION-ELWOOD TELEPHONE COMPANY, MINBURN TELECOMMUNICATIONS, INC., ROCKWELL COOPERATIVE TELEPHONE ASSOCIATION, SHARON TELEPHONE, SHELL ROCK TELEPHONE COMPANY d/b/a BEVCOMM c/o BLUE EARTH VALLEY TELEPHONE COMPANY, SOUTH CENTRAL COMMUNICATIONS, INC., SOUTH SLOPE COOPERATIVE TELEPHONE COMPANY, SWISHER TELEPHONE COMPANY, VENTURA TELEPHONE COMPANY, INC., VILLISCA FARMERS TELEPHONE COMPANY, WEBSTER CALHOUN COOPERATIVE TELEPHONE ASSOCIATION, WELLMAN COOPERATIVE TELEPHONE ASSOCIATION, and WEST LIBERTY TELEPHONE COMPANY d/b/a LIBERTY COMMUNICATIONS, NORTH ENGLISH COOPERATIVE TELEPHONE COMPANY AND WINNEBAGO COOPERATIVE TELEPHONE ASSOCIATION CITIZENS MUTUAL TELEPHONE COOPERATIVE, MABEL COOPERATIVE TELEPHONE COMPANY, TITONKA TELEPHONE COMPANY, LYNNVILLE TELEPHONE COMPANY, AND SULLY TELEPHONE ASSOCIATION, RESPONDING PARTIES.

Docket Nos. ARB-05-2, ARB-05-5, ARB-05-6

"ARBITRATION ORDER"

Issued March 24, 2006

Parties Served:

James L. Pray
Brown, Winick, Graves, Gross, Baskerville
& Schoenebaum, P.L.C.
666 Grand Avenue, Suite 2000
Des Moines, IA 50309-2510

Robert F. Holz, Jr.
Davis, Brown, Koehn, Shors &
Roberts, P.C.
The Financial Center
666 Walnut Street, Suite 2500
Des Moines, IA 50309-3993

Michael R. May
Attorney at Law
1216 East Franklin
Indianola, IA 50125

John R. Perkins
Consumer Advocate
Iowa Department of Justice
Office of Consumer Advocate
310 Maple Street
Des Moines, IA 50319-0063

CERTIFICATE

The undersigned hereby certifies that the foregoing document has been served upon all parties of record in this proceeding in accordance with the requirements of the rules of the Iowa Utilities Board.

Dated March 24, 2006

Donna Dell Olson

Attachment "A"

Board member Stamp previously was an attorney with the law firm which is representing Sprint in this matter. However, during his time with the firm as it pertains to this matter, Board member Stamp did not do any work for Sprint, was not involved in counseling or advising Sprint, and was not privy to any confidential information involving Sprint. After reviewing the relevant professional codes, General Counsel has advised Board member Stamp that he may participate in the decision-making in this docket.

SPRINT – RLEC[1] INTERCONNECTION AGREEMENT

A. Is Sprint entitled to indirect interconnection utilizing the language as proposed by Sprint?

Sprint argues that it is entitled to have the interconnection agreement authorize both direct and indirect interconnection in order to achieve the most economically efficient network arrangement.[2] Indirect interconnection would give Sprint the ability to interconnect at the Iowa Network Services (INS) tandem. Sprint

---

[1] For purposes of the hearing and discussion in this order, the "RLEC Group" includes the following: Ace Communications Group, Clear Lake Independent Telephone Company, Farmers Mutual Cooperative Telephone Co. of Shelby, Farmers Telephone Company, Farmers Mutual Telephone Company, Grand River Mutual Telephone Corporation, Heart of Iowa Communications Cooperative, Huxley Communications, Kalona Cooperative Telephone, La Porte City Telephone Company, Lost Nation-Elwood Telephone Company, Minburn Telecommunications, Inc., Rockwell Cooperative Telephone Association, Sharon Telephone, Shell Rock Telephone Company d/b/a BEVCOMM c/o Blue Earth Valley Telephone Company, South Central Communications, Inc., South Slope Cooperative Telephone Company, Swisher Telephone Company, Ventura Telephone Company, Inc., Villisca Farmers Telephone Company, Webster Calhoun Cooperative Telephone Association, Wellman Cooperative Telephone Association, West Liberty Telephone Company, d/b/a Liberty Communications, North English Cooperative Telephone Company, Winnebago Cooperative Telephone Association, Citizens Mutual Telephone Cooperative, Mabel Cooperative Telephone Company, Titonka Telephone Company, Lynnville Telephone Company, and Sully Telephone Company.

[2] Tr. 49.

TRANSMITTAL

FILED WITH
Executive Secretary

APR 29 2005

IOWA UTILITIES BOARD

Date:	April 29, 2004
Company Name:	Rural Incumbent Local Exchange Carriers (RLECs)
Subject Matter:	Brief in Support of Motion to Dismiss of the RLEC Group
Person to Contact:	Robert F. Holz, Jr. DAVIS, BROWN, KOEHN, SHORS & ROBERTS, P.C. The Financial Center 666 Walnut Street, Suite 2500 Des Moines, IA 50309-3993 Telephone: (515) 288-2500 Facsimile: (515) 243-0654
Initial Filing:	No
Docket Number:	ARB-05-2

Attachment "B"

Secretary
2005
UTILITIES BOARD

STATE OF IOWA

DEPARTMENT OF COMMERCE

UTILITIES BOARD

IN RE ARBITRATION OF:	)	
	)	
SPRINT COMMUNICATIONS COMPANY L.P.,	)	
	)	
Petitioning Party,	)	DOCKET NO. ARB-05-2
	)	
vs.	)	
	)	
ACE COMMUNICATIONS GROUP, CLEAR LAKE INDEPENDENT TELEPHONE COMPANY, FARMERS MUTUAL COOPERATIVE TELEPHONE CO. OF SHELBY, FARMERS TELEPHONE COMPANY, FARMERS MUTUAL TELEPHONE COMPANY, GRAND RIVER MUTUAL TELEPHONE CORPORATION, HEART OF IOWA COMMUNICATIONS COOPERATIVE, HEARTLAND TELECOMMUNICATIONS COMPANY OF IOWA d/b/a HICKORY TECH, IOWA TELECOMMUNICATIONS SERVICES, INC., d/b/a IOWA TELECOM f/k/a GTE MIDWEST, HUXLEY COMMUNICATIONS, KALONA COOPERATIVE TELEPHONE, LAPORTE CITY TELEPHONE COMPANY, LEHIGH VALLEY COOPERATIVE TELEPHONE ASSOCIATION, LOST NATION ELWOOD TELEPHONE COMPANY, MINBURN TELECOMMUNICATIONS, INC., ROCKWELL COOPERATIVE TELEPHONE ASSOCIATION, SHARON TELEPHONE, SHELL ROCK TELEPHONE COMPANY d/b/a BEVCOMM c/o BLUE EARTH VALLEY TELEPHONE COMPANY, SOUTH CENTRAL COMMUNICATIONS, INC., SOUTH SLOPE COOPERATIVE TELCO, SWISHER TELEPHONE COMPANY, VAN BUREN TELEPHONE COMPANY, INC., VENTURA TELEPHONE COMPANY, INC., VILLISCA FARMERS TELEPHONE COMPANY, WEBSTER CALHOUN COOPERATIVE TELEPHONE ASSOCIATION, WELLMAN COOPERATIVE TELEPHONE ASSOCIATION, and WEST LIBERTY TELEPHONE COMPANY d/b/a LIBERTY COMMUNICATIONS,	)	
	)	
Responding Parties.	)	

BRIEF IN SUPPORT OF MOTION TO DISMISS OF THE RLEC GROUP

On April 15, 2005 the RLEC Group filed a Motion to Dismiss the arbitration petition of Sprint filed March 31, 2005. Sprint filed a Response to that Motion on April 26, 2005. This Brief is submitted in support of the RLEC Group's Motion to Dismiss. The RLEC Group incorporates pages 4-7 of its Motion to Dismiss into its Brief and will not repeat that information here.

INTRODUCTION

The main issue to be addressed by the Motion to Dismiss is that Sprint is not eligible to request an interconnection agreement with the Responding Parties nor to seek arbitration of an interconnection agreement. First, Sprint is not a telecommunications carrier as defined in the Federal Act. Second, the requirement of Section 251(c)(1) of the Federal Act to negotiate applies only to subsections (b) and (c). To the extent that Sprint demands interconnection under Section 251(a), there is no obligation to enter into or negotiate an interconnection agreement.

Sprint's central claim is that because MCC's customers will use the services and facilities of Sprint, Sprint is offering services to the public for compensation. At page 3 of its response, Sprint alleges "that Sprint will be offering telecommunications services pursuant to the interconnection arrangements it seeks with the movant's." However, as Sprint acknowledges at page 4, "MCC Telephony of Iowa, Inc. (MCC) will be the customer-facing retail provider of local exchange services in the Iowa Telecom exchanges, while Sprint will be providing interconnection and other telecommunication services to MCC." That is also the plan in the RLEC Group exchanges. It is abundantly clear that Sprint will provide no services to the public and will offer services only to carriers. It states again at page 4:

> Sprint seeks to offer competitive alternatives in telecommunication services to consumers in rural Iowa, through a business model in which Sprint, working with other competitive service providers, provides a full range of competitive local voice telecommunication services. Specifically, in Iowa, Sprint has entered into a business

> arrangement with MCC to support its offering of local and long distance voice services.

That fact, however, is that Sprint will provide no services to and have no relationship with customers in rural Iowa. Sprint's position at page 3 that the Responding Parties' position would "deny Iowa consumers the benefit [of] choice among telecommunications carriers" is simply incorrect. The choice to Iowa consumers will be to choose MCC or to not choose MCC as their carrier. The existence of Sprint will be unknown to the consuming public. In the words of Sprint, "MCC will be the customer-facing retail provider of local exchange services . . . ." (Response, p. 4) Sprint acknowledges that it will not be offering its services to the public for compensation but rather "will be providing interconnection and other telecommunication services to MCC." (Ibid.)

In Virgin Island Telephone Corporation v. FCC, 198 F3rd 92 (DC Circuit 1999) the court affirmed the action of the FCC granting AT&T Submarine Systems, Inc.'s (AT&T-SSI) application for cable landing rights as a non-common carrier. In the case, the court affirmed the determination of the FCC that the interpretation of "telecommunications carrier" under the Federal Act should be essentially the same thing as "common carrier" governed by what is referred to as the NARUC I standard. In a situation functionally similar to Sprint's proposal here, the court affirmed the FCC finding that AT&T-SSI service was not that of a common carrier and not that of a telecommunications carrier. It stated:

> The bureau rejected the argument that AT&T-SSI will be making a service effectively available directly to the public because AT&T-SSI's customers will use the capacity to provide a service to the public, noting that 'such an interpretation is contrary to the plain language of the [1996] Act by focusing on the service offerings AT&T-SSI's customers may make rather than what AT&T-SSI will offer.' (Vitelco at 924)

It is the same proposal that Sprint seeks to offer here, that Sprint wishes to focus on the service offerings that its customer (MCC) may make rather than on what Sprint will offer. That

position has simply been rejected by the FCC. Sprint will not offer any services to the public but will offer its services only to the carrier MCC. The fact that Sprint is not a telecommunications carrier and is not a common carrier will be discussed further in a subsequent portion of this Brief.

At page 5 of its response, referring to the Vitelco case, Sprint states "the movants attempt to limit the definition of telecommunications services by suggesting that the term only encompasses services that are 'provided directly to the public.' Citing the Iowa Telecom Motion, it alleges that Responding Parties have ignored the portion of Section 153(46) which defines telecommunication services so as to include offering of services "to such class of users as to be effectively available directly to the public ..." The quotation of Iowa Telecom from the Vitelco decision at page 927 is to reference the discussion of the court that there must be services which are in fact provided to the public, it just need not be the "whole public". Here Sprint intends to offer no services to the public but to provide services only to the carrier MCC. At page 9 of its Brief, Sprint acknowledges directly that "subscribers will not subscribe directly with Sprint." There is no issue that Sprint will not offer or provide its service to the public.

At page 5 of its response, Sprint states a ruling by the FCC regarding directory listing information supports Sprint's position that it is a telecommunications carrier entitled to interconnection services under Section 251(b).[1] Rather than supporting the Sprint position, that decision is contrary to the position of Sprint and supports the position of the Responding Parties. As the FCC ruled in paragraph 15 of the First Report and Order, "where a DA provider completes the call, and does not merely hand off the call to another entity to complete the call and charge the customer, this service comes within the meaning of Section 251(b)(3)". Again, at paragraph 19 it states "the call completion service of competitive DA providers for intra

[1] Provision of directory listing information under the Telecommunications Act of 1934 as Amended, CC docket No. 99-273. First Report and Order 16 FCC Record RCD 2736, 2001 FCC Lexus 473 (January 23, 2001).

exchange traffic is unquestionably local in nature, and the charge for it, generally imposed on an end user, qualifies as a "exchange" service charge." Thus, if the service is provided to the public and the provider makes a charge to the customer, then it would be exchange service. On the other hand, at paragraph 22, the FCC states "if a competing directory assistance provider does not complete the call either through its own facilities or through resale and impose a separate charge for such service, but rather simply passes a call to another entity that provides all elements of call completion (i.e. that completes the call and charges the customer for the services), the competing directory assistance provider is not providing telephone exchange service within the meaning of Section 3(47)." In other words, if the DA provider is not providing a service to the customer, it is not a provider of telephone exchange eligible to request the services identified in Section 251(b).[2]

SPRINT IS NOT A TELECOMMUNICATIONS CARRIER AUTHORIZED TO SEEK SERVICES UNDER SECTION 251

In its Response to the RLEC Group's Motion to Dismiss, Sprint asserts that it is a "telecommunications carrier" based on certain services that Sprint will provide to MCC through a private business arrangement. In describing this business model, Sprint indicates that it will provide interconnection and other telecommunications to MCC, including interconnection to the public switched telephone network (PSTN), number acquisition and administration, submission of local number portability orders to the ILEC, intercarrier compensation for local and toll traffic, E911 connectivity, operator services directory assistance, directory assistance call completion and the placement of orders for telephone directory listings. Sprint asserts that this private arrangement with MCC constitutes an offering of telecommunications services to the

[2] The FCC actually goes on in that order to discuss agency relationships (¶ 25 et seq.) which have also been noted in this proceeding.

public, or to such class of users as to be effectively available to the public, as required to obtain interconnection under Section 251(a) and (b) of the Act.

As discussed in the RLEC Group's Motion to Dismiss, Sprint is not eligible to invoke the interconnection requirements of Section 251 because Sprint is not a "telecommunications carrier" as that term is defined in the Act. Pursuant to Section 153(44) a carrier is a "telecommunications carrier" only to the extent that it provides telecommunications service. Under Section 153(46) service is deemed a "telecommunications service" only if it is offered for a fee directly to the public, or to such classes of users as to be effectively available to the public, regardless of the facilities used. In construing the term "telecommunications carrier," the FCC has concluded that it means essentially the same as "common carrier" and that the definition included in the Act was intended to clarify that "telecommunications services" are "common carrier services."[3]

Under common law, the concept of a communications "common carrier" is defined by a two-pronged test (the "NARUC Test") formulated as follows: (1) whether the carrier holds itself out to serve indifferently all potential users and, (2) whether the carrier allows customers to transmit intelligence of their own design and choosing.[4] As indicated above, the FCC has interpreted "telecommunications carrier" as effectively identical to "common carrier" and has defined both terms using the same two-pronged test.[5] Under the test, the key determinant is whether the carrier has made an indiscriminate offering of service to whatever public its service

---

[3] Virgin Islands Telephone Corp. v. FCC, 198 F.3d 921, 926 (D.C. Cir. 1999) ("Vitelco") (citing AT&T Submarine Systems, Inc., 13 FCC Rcd. 21585 ¶ 6 (1998); Cable & Wireless, PLC, 12 FCC Rcd. 8516 ¶ 13 (1997)).

[4] U.S. Telecomm. Ass'n v. FCC, 295 F.3d 1326, 1329 (citing, e.g., Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC, 525 F.2d 630, 642 (D.C. Cir. 1976) (hereafter "NARUC I")).

[5] Id. at 1332.

may legally and practically be of use.[6] Where the question is whether a service is held out to the public, the inquiry centers on (a) whether the carrier is under any legal compulsion to serve the public indifferently and (b) whether there are reasons implicit in the nature of the carrier's service to expect the carrier to hold such service out to the eligible user public.[7]

Because Sprint does not intend to offer its proposed service to any party other than its private business partners and will have no relationship (service or otherwise) with the eligible user public, Sprint cannot satisfy the first prong of the NARUC Test and is therefore not entitled to interconnection as a "telecommunications carrier" under the Act. While Sprint suggests that its service is being offered to "such class of users as to be effectively available to the public," there is no credible evidence to support this assertion. The fact remains, and Sprint all but concedes, that Sprint will offer no service to the public and will have no direct relationship with any end user whose traffic will be exchanged under the proposed interconnection agreements. Additionally, it does not appear that Sprint intends or can be expected to indiscriminately hold out its service to any particular class or segment of user who may legally and practically have use of the service. In evaluating Sprint's explanation of its proposed business model, it seems clear that Sprint intends and can be expected to limit its service to a private arrangement with MCC.

In light of Sprint's business decision to limit the availability of its service to MCC and other private partners, its claim to be offering service to the public is without merit. As has been addressed by Iowa Telecom in its Motion to Dismiss, there is effectively no legal distinction between the provision of service "directly to the public" and the provision of service "to such

---

[6] NARUC I, 525 F.2d 630, 642.

[7] Federal-State Joint Board on Universal Serv., *Order on Remand*, 16 FCC Rcd. 571, 573-574 (2001) (citing NARUC I, 525 F.2d at 642).

class of users as to be effectively available to the public."[8] The emphasis is on whether the service provided by Sprint is in fact available to any segment of the public or is limited in scope and availability to Sprint's private partners. As discussed above, Sprint does not hold itself out directly to the public at large or to any class of potential users. Instead, Sprint provides its services as a private carrier under contract with MCC. In contrast, MCC is offering its voice service directly to the end user public and is therefore covered by the definition of "telecommunications carrier," notwithstanding the fact that it may utilize Sprint's facilities to deliver such service. Any use of Sprint's service by MCC's customers does not limit MCC's status as a telecommunications carrier nor does it promote Sprint's status beyond that of a private carrier.[9]

Sprint urges the Board to disregard these well-established principles of common carriage based on certain state commission rulings and courses of dealing in other jurisdictions. In addition to being inconsistent with the Act, Sprint's analysis in this regard is irreconcilable with Iowa law and the Board's precedent regarding common carriage. Sprint's claim that it will offer "more" telecommunications than certain other "telecommunications carriers" is entirely beside the point. The issue is not whether Sprint will offer telecommunications, but whether it will offer telecommunications as a service to the public. As acknowledged in Level 3, the Board has not abandoned the distinction between carriers who offer service to the eligible user public and carriers who limit service to private business partners.[10] Under Iowa law, a carrier's provision of wholesale services to a retail provider is not sufficient to amount to a "holding out" of service to

---

[8] *See* Vitelco, 198 F.3d at 927.

[9] *See* Vitelco, 198 F.3d at 926.

[10] Level 3 Communications, LLC, Docket No. TF-05-31 (TCU-99-1), *Order Rejecting Tariff and Deny Certificate* (Issued April 7, 2005).

the public or to such class of users as to be effectively available to the public.[11] To the extent Sprint continues to cite the Board's Intrado ruling as support to the contrary, the statements relied upon are *dicta* and should be disregarded as inapplicable to a determination of Sprint's eligibility for interconnection under Sections 251 and 252 of the Act.

Sprint's discussion of the Ohio ruling is also irrelevant to the question of whether Sprint will in fact operate as a common carrier or private carrier in Iowa. First, that decision is inconsistent with the Level 3 decision. Second, as quoted by Sprint in its response at page 5, MCI was a certificated carrier in Ohio. Sprint has no such status in these exchanges.

Notwithstanding Sprint's analysis to the contrary, interconnection with Sprint is neither required nor contemplated by Section 251. As recognized by Sprint, a carrier's status as a telecommunications carrier is a prerequisite of its right to avail itself of interconnection under Section 251 and 252. As discussed above, the provision of telecommunications in support of the operations of a private business partner is not a "telecommunications service" under controlling federal and state law and does not entitle Sprint to assert any rights as a "telecommunications carrier" under the Act or its regulatory framework. Under the law, Sprint's status is clear and is based on the company's conscious decision to limit the scope and availability of its proposed service. Sprint's status as a private carrier cannot be altered by Sprint's self-serving construction of the Act or its appeal to the public interest in competitive service alternatives. While the Board may look to the public interest in fine-tuning its regulatory approach, it may not confer common carrier status upon Sprint based on its desired policy goals.[12]

---

[11] *See* Id. at p. 2 (citing Iowa State Commerce Comm'n v. Northern Natural Gas Co., 161 N.W.2d 111, 115 (Iowa 1968)).

[12] *See* Southwestern Bell Telephone Co. v. FCC, 19 F.3d 1475, 1481 (D.C. Cir. 1994) (citing NARUC I, 525 F.2d at 643).

In insisting that interconnection be initiated, negotiated and carried out by the proper party, the RLEC Group makes no attempt to impose any restrictions on the Sprint business model not otherwise required by law. As compared to the business operations of Iowa's various municipal utilities, nothing in the Sprint business model is so novel or unique as to justify an exception to the plain requirements of the Act. Under these familiar arrangements, the retail CLEC offers service to the public as a "telecommunications carrier" and is the proper party to an interconnection agreement with the incumbent carrier. The RLEC Group asks that the Board uphold the public interest in regulatory parity by requiring MCC, as a telecommunications carrier, to initiate, negotiate and carry out the interconnection of the Sprint/MCC network pursuant to the Act and its regulatory framework. While such a result may not advance the business plan of Sprint, the fact remains that Sprint is not acting as a telecommunications carrier in connection with MCC's IP-enabled service and is therefore not eligible to invoke Sections 251 and 252 with respect to that service. Accordingly, Sprint's petition for arbitration should be dismissed.

[redacted]

TRANSMITTAL

FILED WITH
Executive Secretary

OCT 28 2005

IOWA UTILITIES BOARD

Date:	October 28, 2005
Company Name:	Rural Incumbent Local Exchange Carriers (RLECs) and Iowa Telecommunications Services, Inc. d/b/a Iowa Telecom
Subject Matter:	Responding Parties' Post-Hearing Brief
Person to Contact:	Robert F. Holz, Jr. DAVIS, BROWN, KOEHN, SHORS & ROBERTS, P.C. The Financial Center 666 Walnut Street, Suite 2500 Des Moines, IA 50309-3993 Telephone: (515) 288-2500 Facsimile: (515) 243-0654
Initial Filing:	No
Docket Number:	ARB-05-2

Attachment "C"

STATE OF IOWA

DEPARTMENT OF COMMERCE

UTILITIES BOARD

FILED WITH
Executive Secretary

OCT 28 2005

IOWA UTILITIES BOARD

IN RE ARBITRATION OF:	)	
	)	
SPRINT COMMUNICATIONS COMPANY L.P.,	)	
	)	
Petitioning Party,	)	
	)	
vs.	)	
	)	
CLEAR LAKE INDEPENDENT TELEPHONE COMPANY, FARMERS MUTUAL COOPERATIVE TELEPHONE CO. OF SHELBY, FARMERS TELEPHONE COMPANY, FARMERS MUTUAL TELEPHONE COMPANY, GRAND RIVER MUTUAL TELEPHONE CORPORATION, HEART OF IOWA COMMUNICATIONS COOPERATIVE, HEARTLAND TELECOMMUNICATIONS COMPANY OF IOWA d/b/a HICKORY TECH, IOWA TELECOMMUNICATIONS SERVICES, INC., d/b/a IOWA TELECOM f/k/a GTE MIDWEST, KALONA COOPERATIVE TELEPHONE, LA PORTE CITY TELEPHONE COMPANY, LEHIGH VALLEY COOPERATIVE TELEPHONE ASSOCIATION, LOST NATION ELWOOD TELEPHONE COMPANY, MINBURN TELECOMMUNICATIONS, INC. ROCKWELL COOPERATIVE TELEPHONE ASSOCIATION, SHARON TELEPHONE, SHELL ROCK TELEPHONE COMPANY d/b/a BEVCOMM c/o BLUE EARTH VALLEY TELEPHONE COMPANY, SOUTH CENTRAL COMMUNICATIONS, INC., SOUTH SLOPE COOPERATIVE TELCO, SULLY TELEPHONE ASSOCIATION, SWISHER TELEPHONE COMPANY, TITONKA TELEPHONE COMPANY, VAN BUREN TELEPHONE COMPANY, INC., VENTURA TELEPHONE COMPANY, INC., VILLISCA FARMERS TELEPHONE COMPANY, WEBSTER CALHOUN COOPERATIVE TELEPHONE ASSOCIATION, WELLMAN COOPERATIVE TELEPHONE ASSOCIATION, and WEST LIBERTY TELEPHONE COMPANY d/b/a LIBERTY COMMUNICATIONS,	)	DOCKET NO. ARB-05-2
	)	
Responding Parties.	)	

RESPONDING PARTIES' POST-HEARING BRIEF

The Board has before it the rehearing of the Responding Parties' Motions to Dismiss Sprint Communications Company L.P.'s ("Sprint") Petition for Arbitration of an interconnection agreement pursuant to Sections 251 and 252 of the Communications Act of 1934, as amended ("Act"). On May 26, 2005, the Board issued an order granting the Responding Parties' Motions to Dismiss. Order Granting Motions to Dismiss. Following the closing of this docket and initial Federal District Court filings, this matter returns to the Board pursuant to its Order Reopening Docket for Reconsideration and Setting Procedural Schedule issued August 19, 2005.[1]

The Responding Parties' position is simply that any interconnection agreement through which MCC Telephony of Iowa, Inc. ("MCC") provides service to its customers must be entered into by MCC with the Responding Parties, not Sprint. Interconnection pursuant to Sections 251(b) and (c) of the Act, the arbitrable provisions pursuant to Section 252, is for competing carriers, which Sprint is not in the exchanges of the Responding Parties. T. 67, 68, 81. Although the Responding Parties have stated repeatedly that they would be willing to negotiate with Sprint as an agent for MCC, they have no legal obligation to establish a local interconnection agreement directly with Sprint. The Board agreed with this analysis in its Order Granting Motions to Dismiss.

Sprint has not presented any legal or factual claim to justify the Board reversing its previous determination. On rehearing, Sprint is attempting to shift its legal argument to one that it hopes the Board may find plausible. Initially, Sprint attempted to rely on the proposed retail service offerings of MCC Telephony of Iowa, Inc. ("MCC") to support its claim to be a "telecommunications carrier" as defined by Section 3(44) of the Act of 1934, as amended

[1] Submission of this brief and participation in this proceeding in no way diminishes nor waives the position of the Responding Parties that the Board does not have jurisdiction to reopen this docket for reconsideration articulated in their Motion to Dismiss filed August 26, 2005 which has been denied by the Board in its Order issued October 10, 2005.

("Act"), 47 U.S.C. § 153(44). The Board rejected that argument in its order of May 26, 2005 ("Order Granting Motions to Dismiss"). The Board noted that Sprint had not even asserted that it would make its proposed services available on a common carrier basis. Order Granting Motions to Dismiss at 13.

Sprint now seeks an untimely second bite at the apple to allege that it is a common carrier under Federal Communications Commission ("FCC") standards because it: (1) holds itself out to serve indifferently all potential users and (2) allows customers to transmit intelligence of their own design and choosing. Sprint also filed a tariff on October 17, 2005, presumably in an effort to bolster its claim that it intended to offer service as a common carrier. The hearing and this brief demonstrate that Sprint is not a common carrier, but rather serves as a private contract carrier under confidential, individually tailored agreements with contracting competitive local exchange carriers ("CLECs"). Further, Sprint has yet to demonstrate that it proposes to serve as a "local exchange carrier" under 47 U.S.C. § 153(26), a necessary condition for obtaining certain of the rights that Sprint requests.

As stated on numerous occasions, the Responding Parties object not to retail entry by MCC or to Sprint facilitating such entry, but to affording Sprint the status necessary to obtain the rights that Sprint, itself, seeks. The Responding Parties discuss below how the relevant statutory language, as interpreted by federal courts and the FCC, supports the conclusion that Sprint is not a common carrier and thus not a telecommunications carrier within the Act and therefore does not have standing to seek an interconnection agreement or invoke the compulsory arbitration process in Section 252 of the Act under the service arrangement that it proposes with MCC. As a result, the Order Granting Motions to Dismiss issued May 26, 2005 should not be reversed on rehearing.

I. SPRINT DOES NOT PROPOSE TO SERVE AS A "TELECOMMUNICATIONS CARRIER" WITH REGARD TO ITS ARRANGMEENT WITH MCC AND, THEREFORE, DOES NOT HAVE STANDING TO SEEK NEGOTIATION OR ARBITRATION OF AN INTERCONNECTION AGREEMENT UNDER SECTIONS 251 AND 252.

An incumbent local exchange carrier's ("ILEC's") obligation to negotiate an interconnection agreement under Sections 251 and 252 of the Act is limited to "requesting telecommunications carrier[s]." 47 U.S.C. § 252(a)(1). Because the scope of state commission arbitration under Section 252(b)(1) is limited to negotiations under Section 252(a)(1), an entity must also be a "telecommunications carrier" under the Act to seek compulsory arbitration. As acknowledged by FCC rules, rights under Section 251 are only applicable to the extent that the requesting entity is seeking to establish arrangements in its capacity as a telecommunications carrier.[2]

The Act defines "telecommunications carrier" as "any provider of telecommunications services, except that such term does not include aggregators of telecommunications services." 47 U.S.C. § 153(44). The term "telecommunications service," is defined as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. § 153(46). It is that definition which controls the issue in this proceeding.

A. To Be A "Telecommunications Carrier," Sprint Must Offer Service To MCC On A Common Carrier Basis.

It is well-settled law that a carrier must be a "common carrier" to be a "telecommunications carrier" under the Act. Virgin Islands Telephone Corporation v. FCC, 193 F.3d 921, 926-27 (D.C. Cir. 1999)("Virgin Islands"). Thus, as the Board acknowledged in its

[2] See, e.g., 47 C.F.R. § 51.100(b).

Order Granting Motions to Dismiss, Sprint must be a common carrier to be a "telecommunications carrier." Order Granting Motions to Dismiss at 12-13.

There is no disagreement with the federal test for common carrier status. As Sprint acknowledges: (1) whether the carrier holds "himself out to serve indifferently all potential users" and, (2) whether the carrier allows the customer to transmit intelligence of their own design and choosing. Sprint Prehearing Brief at 12, citing, National Association of Regulatory Utility Commissioners v. FCC, 525 F.2d 630 (D.C. Cir. 1976) ("NARUC I"), National Ass'n of Regulatory Utility Commissioners v. FCC, 533 F.2d 601, 608 (D.C. Cir. 1976)("NARUC II").

Before turning to the application of the facts to the instant dispute, the Responding Parties emphasize again the appropriate paradigm for evaluating Sprint's offering – Sprint's contractual relationship with MCC (and, supposedly, other potential cable operators), not Sprint's claimed vicarious "relationship" with MCC's end users. In the Virgin Islands case, the FCC, affirmed by the court, held that a carrier may not rely on the services provided by its carrier customers to their end-user customers to meet the "to the public" test of common carriage.

As discussed in the Responding Parties' original Briefs on Motions to Dismiss, Sprint has seemingly admitted that it is not offering "telecommunications for a fee directly to the public," and, instead, attempts to rely on the second clause of Section 3(46), which Sprint believes forms an independent means by which an entity that offers "telecommunications for a fee . . . to such classes of users as to be effectively available directly to the public," can be a "telecommunications carrier." This argument was already rejected in Virgin Islands:

> [U]nder the Commission's reading of the statute, the emphasis is on the phrase "to the public" that appears in both "directly to the public" and "effectively available directly to the public," and the difference between "directly" and "effectively available directly" is important merely for the purpose of emphasizing the proposition that "common carriers need not serve the whole public." This is a reasonable reading of the statute, and petitioner's repeated demand that the

> Commission articulate an interpretation of "effectively available directly to the public" that is separate from "directly to the public" evinces its failure to comprehend the structure of the NARUC I test and the Commission's application of it. (Virgin Islands, 193 F.3d at 926, internal citations and original emphasis omitted, new emphasis added)

The Board acknowledged this precedent in its Order Granting Motions to Dismiss, precedent that has not since changed.

B. Because Sprint Does Not Propose To Offer Service To MCC On A Common Carrier Basis, Sprint Is Not A "Telecommunications Carrier."

Sprint summarizes the service that it proposes to provide to MCC through the interconnection arrangements requested in the instant proceeding as follows: "While MCC will provide the 'last mile' portion of the network which includes the MCC hybrid fiber coax facilities, the same facilities it uses to provide video and broadband Internet access, Sprint will provide all public switched telephone network (PSTN) interconnection utilizing Sprint's switch . . ." Sprint Prehearing Brief at 3. Sprint further states that it "intends to provide the interconnection services to all entities who desire to take them and who have comparable 'last mile' facilities to the cable companies." Id. at 13.

As discussed below, despite the statement of intent, the evidence demonstrates that the type of service that Sprint proposes to offer to MCC is not offered on an "indifferent basis" to "all potential users." Sprint proposes rather a confidential narrowly-tailored contract on a highly-individualized operational and price basis. All contracts are separately negotiated and confidential.

In NARUC I, the D.C. Circuit delineated some of the salient characteristics of a private, as opposed to public, offering. It made clear that "a carrier will not be a common carrier where its practice is to make individualized decisions, in particular cases, whether and on what terms to deal." NARUC I, 525 F.2d at 641. In evaluating whether specialized mobile radio service

("SMRS") providers were common carriers, the D.C. Circuit observed that serving a limited number of customers through stable medium-to-long-term contracts is an indicator of private contract carriage:

> The nature of the dispatch services which SMRS will primarily offer appear necessarily to involve the establishment of medium-to-long-term contractual relations, whereby the SMRS supply the needs of users for dispatch facilities for a period of time. In such a situation, it is not unreasonable to expect that the clientele might remain relatively stable, with terminations and new clients the exception rather than the rule. . . . If the SMRS business is as hypothesized above, and nothing in the briefs or argument indicates otherwise, there would appear to be little reason to expect any sort of holding out to the public at all.

Id. at 643 (footnotes omitted).

When considering the regulatory classification of initial ILEC "dark fiber" offerings, the D.C. Circuit stated as follows: "If the carrier chooses its clients on an individual basis and determines in each particular case 'whether and on what terms to serve' and there is no specific regulatory compulsion to serve all indifferently, the entity is a private carrier for that particular service . . . ." Southwestern Bell Telephone Company v. FCC, 19 F.3d 1475, 1481 (D.C. Cir. 1994)("SWBT"). The court observed that the "ICB service contracts were individually tailored arrangements negotiated to last for periods of five to ten years. As an initial matter, therefore, they were not like the indiscriminate offering of service on generally applicable terms that is the traditional mark of common carrier service." Id. Further, the court observed that even the public filing of a contract does not necessarily "reflect[s] a conscious decision to offer the service to all takers on a common carrier basis." Id.

The FCC has observed that individual case basis arrangements ("ICBs") for services that are not at the time available on a non-ICB basis, such as the service that Sprint proposes to provide MCC, are not "generally-available" and are therefore not common carrier offerings: "In some cases, ICB services feature new technology for which little demand exists. As demand for

the service grows, the ICB offering can evolve into a generally-available offering, as has been the case with large, digital, fiber optic transmission facilities." Policy and Rules Concerning Rates for Dominant Carriers, 5 FCC Rcd 6786, 6810, ¶ 193 (1990). The FCC has alternatively observed that "[I]n other applications, ICB offerings are simply unique service arrangements to meet the needs of specific customers that will never evolve into generally-available offerings." Id. Similarly, here Sprint's offering is an ICB offering to meet the specific service needs of contracting cable companies.

Most recently the FCC had occasion to discuss the offering of broadband services either as a common carrier or on the basis of non-common carriage contracts. Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Report and Order and Notice of Proposed Rulemaking, CC Docket No. 02-33, FCC 05-150 (rel. Sept. 23, 2005)("Wireline Broadband Order"). The FCC recognized that contract carriage would allow customers to negotiate service arrangements which would best address their particular needs. Id. at n.263. The service, however, could be provided on a common carrier basis, and even without a tariff, but only under certain conditions:

> Such providers thus may, in lieu of filing tariffs with the Commission setting forth the rates, terms, and conditions under which they will provide broadband Internet access transmission service, include those rates, terms, and conditions in generally available offerings posted on their websites. Each such provider electing not to tariff the broadband Internet access transmission that it offers as a telecommunications service also must make physical copies of its offering reflecting the rates, terms, and conditions available for public inspection at a minimum of one place of business.

Id. at ¶ 90.

The hallmark of common carriage is thus generally available, publicly displayed rates, terms and conditions for a service. The rates, terms, and conditions of the service that Sprint proposes to offer to MCC through the interconnection arrangement that Sprint seeks are so

specialized that they are considered highly confidential. There are no transparent terms, there is no publicly available offering. Mr. Burt in his Direct Testimony suggests several of the variables that will be separately negotiated; network configuration, amount of services, different switching capabilities, costs (prices) and terms reflecting business differences. T. 39. The fact that Sprint's negotiations with a cable operator tend to begin with a template agreement is irrelevant because the variables necessary to determine the ultimate rates, terms, and conditions of Sprint's offerings are not made publicly available to anyone (including, presumably, to the potential cable operator customer) prior to lengthy negotiation and then, even after such negotiation, to any other parties.

The D.C. Circuit made clear in Virgin Islands that an entity making such individualized decisions regarding rates, terms, and conditions, is not a common carrier:

> whether AT&T-SSI "intend[ed] to make 'individualized decisions, whether and on what terms to serve.'" Noting that the Bureau had found that "AT&T-SSI would have to engage in negotiations with each of its customers on the price and other terms which would vary depending on the customers' capacity needs, duration of the contract, and technical specifications," the Commission found that AT&T-SSI "will not sell capacity in the proposed cable indifferently to the public."

Virgin Islands, 193 F.3d at 925 (internal citations omitted). This analysis, resulting in a finding that AT&T-SSI was not engaged in common carriage, was approved by the D.C. Circuit and, given the facts discussed herein, applies equally well to Sprint.

The Board went on in the Order Granting Motions to Dismiss to observe that "At no point in this proceeding has Sprint asserted that it will make its proposed services available on a common carrier basis." Order Granting Motions to Dismiss at 13. The Board summarized the test for a common carrier and Sprint's apparent intent:

> The test for determining whether a carrier is a "common carrier" is analyzed in some detail on the USTA decision. The key question for purposes of this case appears to be

> whether in these RLEC exchanges Sprint will hold itself out indiscriminately to serve all within the class of potential customers. USTA, 295 F.3d at 1329-301, citing various FCC decisions. Again, there is nothing in Sprint's petition to demonstrate that it will serve all customers on the same terms and conditions; instead, it appears Sprint intends to negotiate separately with each potential customer, to the extent it has customers other than MCC.

Id. at n.7.

The Board's grant of rehearing has given Sprint the opportunity to demonstrate whether it will serve all customers on the same terms and conditions or indeed whether it will negotiate separately with each customer. The facts presented at the hearing demonstrate that the contracts on which Sprint relies are highly individualized contracts, separately negotiated and maintained in total confidentiality, the antithesis of services offered by a common carrier.

The facts are clear that Sprint's contracts are individually negotiated with each company to reflect the specific circumstances of each company. T. 61, 90 and 156. The prices for the MCC contract and the Wide Open West, Time Warner Cable, Wave Broadband, and Blue Ridge Communications are all different. T. 64.

Sprint introduced Exhibit 3 which is a marketing piece listing available services for cable companies. What is clear is that there is no generally available price sheet for those services. T. 161. Every contract is going to be negotiated separately with each potential customer. Mr. Burt testified:

> Q. And where do I find the prices for that?
>
> A. Prices would be in the agreement.
>
> Q. There is not a website or some sort of an ala carte sheet that I go to to find out what the prices are?
>
> A. No.
>
> Q. So you're going to make a proposal to a company after they contact you that they would like to have services, correct?

A. Yes, based on those services that they choose to purchase from us, correct.

Q. All right. And then you'll negotiate all the terms and conditions and what the price is?

A. Yes.

T. 162.

As the negotiations are undertaken, all the terms and conditions of other contracts are kept confidential. T. 91. As MCC negotiated its contract, the terms and conditions of all prior contracts were kept confidential. T. 94.

These are clearly private contractual arrangements, in the words of the Nebraska Commission "individually negotiated and tailored, private business arrangements shielded from public review and scrutiny." The terms, conditions and prices are not generally available. In the words of the Court in SWBT, these are "not like the indiscriminate offering of services on generally applicable terms that is the traditional mark of common carrier service." The Board can observe in the confidential record how the length of the Sprint contracts compares with those discussed in SWBT. T. 110-111.

The Nebraska Public Service Commission has reviewed Sprint contracts with cable operators similar to that under consideration in the instant proceeding. In its Findings and Conclusion entered September 13, 2005 in Application No. C-3429 ("Nebraska Order"), the Nebraska Commission, on virtually the same Sprint testimony as here, ruled that Sprint is not a telecommunications carrier. The Nebraska Commission found that:

> . . . Sprint has not produced sufficient evidence to persuade us that it is a "telecommunications carrier" when it fulfills its private contractual obligation to Time Warner. Rather, Sprint's arrangement with Time Warner is an individually negotiated and tailored, private business arrangement shielded from public review and scrutiny. As such, Sprint cannot sustain any claim that it is eligible under Sections 251 and 252 to assert rights afforded "telecommunications carriers" through its arrangement with Time Warner. Although the Sprint witness testified that Sprint is willing to make its wholesale services available to others, it has not

> demonstrated by its actions that it is holding itself out "indiscriminately" to a class of users to be effectively available directly to the public.
>
> We are unconvinced for many reasons. First, the Wholesale Voice Services Agreement is a private contract between Sprint and Time Warner and is treated by Sprint as confidential. Also, Sprint states that any agreement will be individually tailored to the cable company with which Sprint is contracting and Sprint will address the needs and capabilities as presented. See Ex. 102, Burt Testimony at 27. Independently, the individualized nature of Sprint's arrangements is demonstrated by the existence of both the Sprint-Time Warner Wholesale Voice Services Agreement and the Sprint-Cable Montana LLC Wholesale Voice Service Agreement. See Ex. 20. Thus, the record confirms that Sprint tailors its arrangements with respect to those entities with which it wishes to contract.

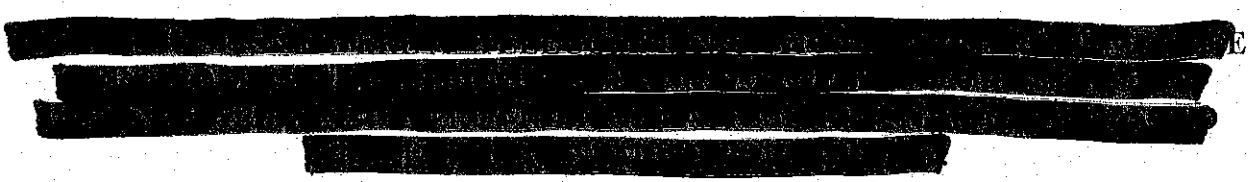
Nebraska Order at 9. The Nebraska analysis is equally applicable to the Board's consideration in this case.

Sprint's October 17, 2005 tariff submission serves as Sprint's latest attempt to place a common carrier gloss on its highly-confidential, highly-specialized private arrangement with MCC. As an initial matter, Sprint's legal authority to file such a tariff is highly questionable. On its face, the tariff is functionally no different than the Level 3 tariff previously rejected by the Board. Level 3 Communications LLC, Docket No. TF-05-31 (TCU-99-1), "Order Rejecting Tariff and Denying Certificate," April 7, 2005 ("Level 3"). In Level 3 the Board rejected the tariff filing since it did not include business or residential service rates and was only a wholesale interconnection between itself and ISPs. Sprint's proposed tariff revision envisions an offering that is applicable only to a carrier for a wholesale service and not for any end user. The filing will likely be rejected as was Level 3's.

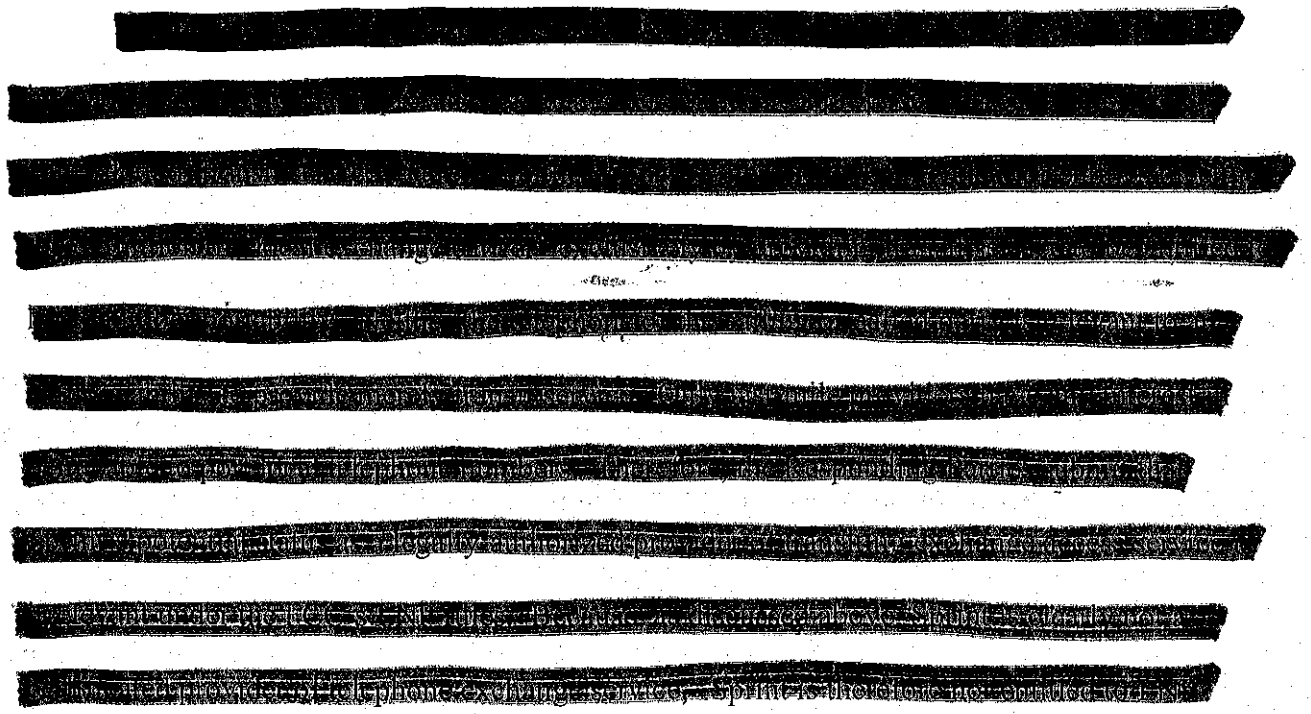
Even if the services contained in Sprint's October 17, 2005 proposed tariff revision were lawfully tariffed, they would be irrelevant to this proceeding. Sprint acknowledges in the second to last paragraph of Confidential Exhibit 102 that even the services to MCC will not be provided under the tariff. Further, the tariff, as revised, clearly does not encompass the offering by Sprint to MCC. In fact, the tariff represents only a small portion of the services included in the offering to MCC. T. 57, 59-61.

As Mr. Burt acknowledged, "the relationship between Sprint and Mediacom is based on the agreement that we have. . . . Some of which is offered pursuant to the tariff, but the sum total of what we're providing is per the entire agreement that we have." T. 134. Sprint has provided no evidence that its proposed tariffed offering would be used in a manner remotely similar to the full panoply of alleged telecommunications service inputs that Sprint proposes to provide to MCC. In fact, Sprint represents that only five of the 43 services in its contract with MCC would are included in the proposed tariff revision. Confidential Exhibit 102. Further, Mr. Burt identified only three services from the list of services in the gray area of Exhibit 3 which would be included in the tariff offering, T. 172, which do not include, among other things, number assignment and number portability, services Sprint represents.

Ultimately, the Board is faced with evaluating the common carrier nature of Sprint's contractual relationship with MCC. For Sprint to be a "telecommunications carrier" under the Act, Sprint's offering to MCC must be made indifferently and on generally available terms and conditions. Many of the critical components (including the supposed telecommunications service) of the service the Sprint proposes to offer to MCC are being provided outside of the tariff and on highly-customized and secret rates, terms, and conditions.[3] The FCC has made clear that the rates, terms and conditions of generally available offerings may be posted on a website and made available for public inspection. Sprint has made no attempt to make public the rates, terms, and conditions of its agreement with MCC or even a formula that could be used to determine the applicable rates. Sprint is proposing to engage in private, not common, carriage.



[3] Even the fraction of supposed telecommunications services that Sprint may be offering MCC supposedly via tariff are priced as "ICB," thus adding further irrelevancy of the tariff to Sprint's agreement with MCC.

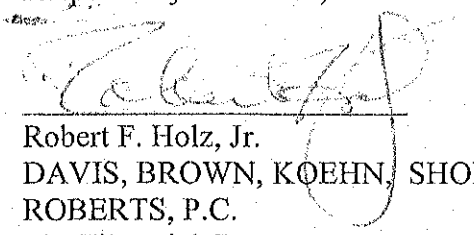


CONCLUSION

The core issue to be decided pursuant to the Motion to Dismiss is whether Sprint is a "telecommunications carrier" under the federal act. To be a "telecommunications carrier," Sprint must provide its service as a common carrier. Sprint first claimed it was a "telecommunications carrier" by virtue of the services which would be provided by its customer, MCC. That theory was rejected by the FCC, which was affirmed by the D.C. Circuit, in the Virgin Islands case and the Board's Order Granting Motions to Dismiss. On this reconsideration, Sprint claims it is a common carrier alleging that it holds itself out to serve indifferently all potential users. The evidence not only does not support such an allegation, but proves conclusively that the allegation is simply not true. The services are clearly provided only pursuant to individually negotiated and tailored, highly confidential private contractual arrangements. The filing of a discrete tariff on October 17, 2005 does nothing to support the proposition that Sprint will offer its services to

MCC on a common carrier basis. The provision of service will only be on a private contract basis. There being no support for Sprint's offering of service to MCC as a common carrier, there is no basis to change from the decision of May 26, 2005 to dismiss the application for arbitration.

Respectfully submitted,



Robert F. Holz, Jr.
DAVIS, BROWN, KOEHN, SHORS & ROBERTS, P.C.
The Financial Center
666 Walnut St., Suite 2500
Des Moines, IA 50309-3993
Telephone: (515) 288-2500
Facsimile: (515) 243-0654

ATTORNEYS FOR RLECs

Edward B. Krachmer
Iowa Telecommunications Services, Inc.
d/b/a Iowa Telecom
115 S. Second Avenue West
Newton, IA 50208

ATTORNEY FOR IOWA TELECOMMUNICATIONS SERVICES, INC. d/b/a IOWA TELECOM